Victim Law Day: Seeking Justice for Victims and Enforcing their Rights

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Registrar of Contractors: Building a Case from the Ground Up

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Distributed by:

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What is the Registrar of Contractors?

- Regulatory Agency
 Mission Statement Protect the health, safety and welfare of the public through a regulatory system designed to promote quality construction by Arizona contractors.
 - The Registrar:

 - Regulates licensed contractors;
 Investigates unlicensed contracting and refers cases for prosecution; and
 Administers the Residential Contractor's Recovery Fund.

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Registrar Composition

- The Registrar is primarily made up of three departments:

 - Licensing
 Processes license applications 2,500
 Issues licenses and renewals 18,000
 Maintains licenses 36,000

 - Compliance
 Investigate complaints (licensed & unlicensed) 6,000-7,500
 Recommend citations

 - Legal
 Support licensing and compliance
 Direct cases through the administrative process
 Administer the Residential Contractor's Recovery Fund

Purpose of Licensing Statutes

• "Statutes relating to licensing requirements for contractors are regulatory measures designed for protection of the public against the unscrupulous and unqualified."

Westinghouse Elec. Corp. v. Rhodes, 397 P.2d 61, 63 (Ariz. 1964).



Quick Volumes

- Complaints
 Opened (Submitted and Own Motion) Annually 6,000-7,500
 Licensed 70-75 percent
 Unlicensed 25-30 percent
- Unlicensed
 1,500-2,250
- Submitted for Prosecution 397

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Step 1: Is this "Contracting"?

Questions

- Does this individual/entity perform contracting activities?
- Was this individual/entity compensated for their work?
- Related: Why be licensed? (A.R.S. § 32-1153)

A.R.S. § 32-1	1101(A)(3) — "C	ontractor" Covered Projects
Offering Bidding Responding to a request for qualification Doing the work yourself Directly or indirectly supervising others	Altering Constructing Repairing Adding to Subtracting from Improving Moving Wrecking Demolishing Connecting to utility/service lines	Buildings Highways Roads Railroads Excavations Structures Developments Improvements

"Contractor"

A.R.S. § 32-1101(A)(3)(b) - "Contractor" includes:

- Subcontractors
- Specialty contractors;
- Floor covering contractors;
- Landscape contractors, other than gardeners; and
- Consultants representing themselves as having the ability to supervise or manage a project for the benefit of the property owner.

Look for factors such as:

- Hiring and firing of specialty subcontractors
- Scheduling work on the project; and
- Selection and purchasing of construction material.

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Compensation

- Basic Rule If there is no compensation, then there is no "contracting"
- But, "Compensation" does not mean "profit"
 Rent is not "compensation" for construction services See Levitan v. State, Registrar of Contractors, 33 P.3d 796, 797 (Ariz. App. 1st Div. 2001).



Who is Licensed?

- Registrar licenses businesses, <u>not</u> individual employees
 Corporations;
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 - LLCs;
 Sole Proprietorships;
 Partnerships;

 - Any combination of any of them.

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"Contractor" - Summary

Any person or any business that, for compensation:

- Performs a construction-related task: or
- Supervises anyone else performing a construction-related task

Likely meets the definition of a "contractor" and needs to be properly licensed to perform that task, $\it unless~an~exemption~applies.$

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License Required for Civil Action



§ 32-1153. Proof of License as Prerequisite to Civil Action

- No contractor shall maintain any action in any court of the state for collection of compensation for the performance of any act for which a license is required unless they were duly licensed:
 - When the contract sued upon was entered into:
 AND
 - When the alleged cause of action arose

Step 2: Exemptions

Questions

- Does this individual/entity need to be licensed?
- Could an exemption apply?
- Has this individual/entity met all of the exemption's requirements?

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Exemptions



- "This chapter does not apply to..." A.R.S. § 32-1121
 "...[C]reates safe harbors for certain specific categories of persons who do contracting work." *Levitan*, 33 P.3d at 798.

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Owner-Builder Exemption

- A.R.S. § 32-1121(A)(5) No license required if the:
 Owner does the work himself, with his own employees, or with a licensed contractor;
 Structure is intended for occupancy solely by the owner; and
- Structure is not intended for sale or rent.
 Proof of sale, or offer to sell within one year of completion is *prima facie* evidence that the project was undertaken for purpose of sale or rent.



Owner-Developer Exemption



- A.R.S. § 32-1121(A)(6) No license required if:

 Owner builds structure for the purpose of sale or rent; and

 Contracts with licensed general or specialty contractors.
- To qualify for this exemption, licensed contractors' names and license numbers must be included in all sales documents.

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Bona Fide Employee Exemption

- A.R.S. § 32-1121(A)(11) No license required if the person engaging in contracting activities is:
 An employee of an exempt property owner; or
 An employee with wages as that person's sole compensation.



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Less Than \$1,000 Exemption



- A.R.S. § 32-1121(A)(14) No license required if the work is under \$1,000.
- Limitations:
 - Cannot be part of a larger or major undertaking.
 Doesn't apply if a building permit is required.
 All advertisements must state "Not a licensed contractor".

Step 3: Charging Statutes

Questions

- Which statute applies?
- Is this advertising or contracting?
- What are the civil or criminal penalties?

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Advertising Contracting Services Without a License Advertising. § 32-1165. Advertising; effect of; classification • Advertising contracting services without a license is a class 1 misdemeanor • Exception - "Not a licensed contractor" A.R.S. § 32-1121(A)(14)(c)

Contracting Without a License

§ 32-1164. Violation; Classification; Probation; Conditions

Acting in the capacity of a contractor within the meaning of Title 32, Chapter 10 without a license is a class 1 misdemeanor



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Contracting Without a License: Penalties

Criminal Penalties

- A.R.S. § 32-1164
- Acting in the capacity of a contractor without a license is a class I misdemeanor
 - First offense \$1,000 minimum fine
 - Subsequent offenses \$2,000 minimum fine

Civil Penalties

- A.R.S. §§ 32-1166 & 32-1166.01
- Initial penalty can be \$200 \$2,500 A.R.S. § 32-1166(A)
 Subsequent violations can be up to \$2,500 per day

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Contracting Without a License -Mandatory Probationary Conditions



§ 32-1164. Violation; Classification; Probation; Conditions

- Mandatory payment of:
 - Transaction privilege taxes
 - Use taxes

Step 4: Evidentiary Concerns

Questions

- Are there any evidentiary shortcuts I can use?
- What information/involvement will I get from the Registrar?

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Affidavits



A.R.S. § 32-1104(A)(3) – Registrar's authority to furnish: • Certified copy of any license issued; or

- An affidavit that:

 - No license exists, or
 A license was cancelled or suspended.

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Existence of A Contract

A.R.S. § 32-1151 – For purposes of Title 32, Chapter 10, the following are <u>prima</u> <u>facie</u> evidence of existence of a contract:

- Securing a perm governmental a
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Registrar Referral



The Registrar will only refer cases with victims

- Purely administrative cases are handled civilly
- Civil penalties can be reduced to \$200 if offender gets licensed
 Victims must be willing to
- participate

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Referral Packet

When the Registrar refers a case for prosecution it will generally include:

• Official Department Report (ODR);

- Photo Lineup; Victim statements;
- Assigned Investigator contact information



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Step 5: Restitution

Questions

- Which statute applies?
- Advertising or contracting?

Restitution

Restitution is not punishment exacted by the State, it's purpose is solely to make the victim whole.

State v. Zaputil, 220 Ariz. 425, 428 ¶ 11, 207 P.3d 678, 681 (App. 2008)

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State v. Wilkinson

<u>Facts</u>

- John Porter contracted with 2 homeowners to perform remodeling work T.S. paid Porter \$2,854.77 N.L. paid Porter \$9,040.27
- Porter did not have a contractor's license
- Porter was charged and convicted of two counts of acting in the capacity of a contractor without holding a contractors license.



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State v. Wilkinson



Municipal Court's Restitution

- At the restitution hearing, municipal judge awarded:
 T.S. \$22,429.11
 N.L. \$22,365.67
- Damages calculation: Amounts each victim had paid to Porter
 - + Cost of repairing Porter's faulty work + Cost of finishing incomplete work

 - Damages

State v. Wilkinson

State's Special Action

Court of Appeals determined that the economic loss the victims suffered was a "remote, indirect, or consequential result" of Porter's crime, and therefore beyond the scope of criminal restitution



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State v. Wilkinson



Arizona Supreme Court

Granted review to determine whether a victim can recover restitution from a person convicted of contracting without a license.

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State v. Wilkinson

Three Part Test for Restitution

- 1) The loss must be economic
 2) The loss must be one that the victim would not have incurred but for the defendant's criminal offense
 3) The criminal conduct must directly cause the economic loss



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Amounts Paid Under Contract

- Porter entered into agreements with T.S. and N.L. to provide contracting services.

 This violated A.R.S. 32-1151

 Porter's criminal actions directly caused those losses
- Requiring Porter to pay restitution for damages that resulted directly from this criminal conduct is proper

$\frac{\text{Amounts Paid to Remedy Poor}}{\text{Work}}$

- Porter's criminal conduct of contracting without a license did not cause these losses.
- The losses incurred as a result of Porter's poor and unfinished work constitute indirect damages and cannot qualify for restitution

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State v. Wilkinson - What it says

Summary

- Consideration paid by T.S. and N.L. was the "loss" that flowed directly from Porter's illegal conduct.
- Any damages for repairing T.S.'s and N.L.'s homes or completing the work were not "direct" because those damages required the occurrence of a second causal event unrelated to the criminal activity itself that is, Porter's faulty and unprofessional performance

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State v. Wilkinson - What it does not say

BUT, $\it Wilkinson$ did not address whether losses incurred by victim-homeowners may be reduced by benefits conferred upon them...

Town of Gilbert Prosecutor's Office v. Downie

- Mitchell Matykiewicz contracted with Richard & Felicita Rada to perform remodeling work on their home in Gilbert, A7 AZ
 • The Radas paid him \$52,784.22
- Matykiewicz was charged and convicted of acting in the capacity of a contractor without holding a contractors license.



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Town of Gilbert Prosecutor's Office v. Downie



Municipal Court's Restitution

- At restitution hearing, municipal judge awarded the Radas restitution of \$52,784.22
 The entire amount the Rada's had paid

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Town of Gilbert Prosecutor's Office v. Downie

Superior Court

- On appeal, superior court vacated the restitution order
 Concluded that Wilkinson only decided whether damages for incomplete or faulty work were recoverable as restitution
- Remanded the case for a determination of the Rada's economic loss



Town of Gilbert Prosecutor's Office v. Downie



State's Special Action

- Arizona Court of Appeals reversed and reimposed the \$52,784.22 restitution order
 The majority held that Wilkinson requires disgorgement of "all payments made by victims to an unlicensed contractor under a contract."

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Town of Gilbert Prosecutor's Office v. Downie

Arizona Supreme Court

Granted review to decide whether in determining how much "economic loss" a victim has suffered, the court must consider any value conferred on the homeowner.



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Town of Gilbert Prosecutor's Office v. Downie

Holding

- Determining a victim's "loss" requires consideration of any benefits conferred on the victim.

 Most often, there will be no reductions, as criminals rarely confer a benefit on their victims (e.g. for work performed, or materials provided)

 If value is conferred, however, courts must consider such benefits in determining a victim's loss



Town of Gilbert Prosecutor's Office v. Downie

Application on Remand

- Determination of a victim's loss will depend on the unique facts of each case

 But the Radas' payments to Matykiewicz constitute prima facie evidence of their loss.
- The court must subtract any value conferred on the Radas from the amount of payments made to Matykiewicz
 To this figure, the court must apply the remaining parts of the Wilkinson three-part test-
- Court may not compensate the Rada's for expenses they incurred because Matykiewicz failed to complete the work he contracted to do or did so in a faulty manner

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Town of Gilbert Prosecutor's Office v. Downie

What *Town of Gilbert* does <u>not</u> say:

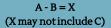
Decision does not alter any rights a homeowner may have to recover any indirect or non-economic damages in a <u>subsequent civil action</u> against an unlicensed contractor.

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Restitution Summary

Criminal Restitution

- A = Payments made by Victims
- B = Value Conferred by Unlicensed Contractor
- C = Expenses Incurred by Victims X = Restitution





We're here.

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